June 7, 2018

BY ELECTRONIC FILING
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: NOTICE OF EX PARTE
WT Docket Nos. 17-79, 15-180: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment;*
WC Docket No. 17-84: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*

Dear Ms. Dortch:

Competitive Carriers Association ("CCA")[1] writes to supplement the record in the above-referenced proceedings. CCA applauds the Federal Communications Commission's ("FCC" or "Commission") work to address barriers to broadband deployment. CCA has long supported the Commission's efforts to streamline siting processes and to address excessive fees that pose substantial challenges to carriers seeking to deploy services all over the country, in rural and urban areas alike.[2] As the record in these proceedings makes clear, tailored reforms are necessary to overcome state and local practices that are effectively blocking deployment.[3] CCA maintains that the Commission has the authority pursuant to Sections 332 and 253 of the Communications Act, as amended, to improve state and local siting procedures including by shortening shot clocks for review of applications for collocations and other deployments and limiting local fees to nondiscriminatory, publicly-disclosed actual costs, among other regulatory reforms.

Sections 332 and 253 of the Communications Act, as amended, provide the Commission with the necessary authority to take action regarding state and local siting processes that are effectively prohibiting carriers from providing telecommunications services. The Commission has broad authority to interpret

[1] CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

[2] *See, e.g.*, Comments of Competitive Carriers Association at 2, WT Docket Nos. 17-79, 15-180, WC Docket No. 17-84 (filed June 15, 2017) ("CCA Comments"); Reply Comments of Competitive Carriers Association at 2, WT Docket Nos. 17-79, 15-180, WC Docket No. 17-84 (filed July 17, 2017) ("CCA Reply Comments"); Letter from Rebecca Murphy Thompson, EVP & General Counsel, Competitive Carriers Association, to Marlene Dortch, WT Docket Nos. 17-79, 15-180, WC Docket No. 17-84 (filed Feb. 15, 2018); Letters from Rebecca Murphy Thompson to Marlene Dortch, WT Docket Nos. 17-79, 15-180, WC Docket No. 17-84 (filed Mar. 16, 2018); Letter from Rebecca Murphy Thompson to Marlene Dortch, WT Docket Nos. 17-79, 15-180, WC Docket No. 17-84, at 1 (filed May 16, 2018).

[3] *See., e.g.*, CCA Reply Comments at 2; Comments of T-Mobile at 5-12, 23-26, WT docket No. 17-79, WC Docket No. 17-84 (filed June 15, 2017).

Sections 253 and 332, and to adopt rules and regulations in furtherance of those sections. Specifically, Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[4] Accordingly, the FCC's ability under Section 253(a) to enact prospective regulations that modify state and local laws and regulations rests on whether the state action "prohibit(s) or ha(s) the effect of prohibiting" the provision of telecommunications services.

Section 332(c)(7) similarly limits State and local government "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality" using the same language as that of Section 253(a): such regulation shall not "prohibit or have the effect of prohibiting the provision of personal wireless services."[5] Under principles of statutory construction, the identical language in Sections 253 and 332 should have the same meaning.[6] Put simply, if a state or local regulation has the effect of prohibiting service, then the FCC has the authority to modify such regulation under Sections 253 and 332.[7] Section 201(b) of the Communications Act also empowers the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions."[8]

This authority is furthered by the Supreme Court's decision in *Brand X* which provides federal agencies significant latitude to interpret statutes within the agencies' discretion.[9] Further, *Chevron* requires a federal

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[4] 47 U.S.C. § 253(a). In addition to plain statutory authority, the courts also have established that Section 253(a) "authorizes preemption of state and local laws and regulations expressly or effectively prohibiting the ability of any entity to provide telecommunications services." See, *Puerto Rico Tel. Co. v. Municipality Of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006) (holding that ordinance requiring providers to pay 5 percent of revenues monthly was preempted by Section 253(a), and that it did not fall within the safe harbor of Section 253(c)) (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 128 (2004)) (internal quotation marks omitted); *see also Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004) (Section "253 contains a clear expression by Congress of an intent to preempt local ordinances which prohibit the provision of telecommunications services.") (internal citation omitted).

[5] 47 U.S.C. § 332(c)(7).

[6] *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same Act are intended to have the same meaning.") (internal quotations marks omitted). *See also County of San Diego*, 543 F.3d at 578-79 (noting that Sections 253(a) and 332(c)(7)(b)(i)(ii) had been subject to different interpretations of the same language under *City of Auburn*, despite use of identical language in the two provisions).

[7] This is subject to Section 253(c), which states that Section 253 does not affect the "authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

[8] 47 U.S.C. § 201(b).

[9] *See National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Brand X*") ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). The Supreme Court's decision in *Brand X* also specifically notes that "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X* at 980.

court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency's jurisdiction to administer, the agency's construction is reasonable, and Congress hasn't spoken to the issue.[10] The Commission's statutory authority to "execute and enforce" the Communications Act and to "prescribe such rules and regulations as may be necessary … to carry out the [Act's] provisions,"[11] give the Commission power to promulgate binding legal rules. Similarly, the Supreme Court has affirmed that Section 201(b) applies to provisions subsequently added to the Communications Act, including those provisions of the Telecommunications Act of 1996.[12] Accordingly, the Commission has authority to interpret Sections 253 and 332 "as may be necessary in the public interest" to carry out those provisions.[13]

Applying *Brand X* and other precedent to CCA's advocacy,[14] the Commission should interpret Section 253(a) as "preempting conduct by a locality that materially inhibits or limits the ability of a provider to compete in a fair and balanced legal and regulatory environment"[15] in line with the *California Payphone* decision. The FCC has before it a voluminous record of state and local regulations and requirements that commenting parties assert have prohibited or have the "effect of prohibiting" telecommunications services, which, in turn, impedes the FCC's broad goal to deploy advanced services nationwide.[16] Therefore, the FCC should interpret Section 253(a)'s language "prohibit or have the effect of prohibiting" to govern a state or local action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a

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[10] *Brand X*, 545 U.S. at 980; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) *quoting Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

[11] 47 U.S.C. § 201(b).

[12] *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-378 (1999).

[13] 47 U.S.C. § 201(b).

[14] CCA Comments at 22-23.

[15] *See California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, para. 38 (1997) (*California Payphone*); *see also TCG N.Y., Inc., v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (agreeing with the precedent set forth in *California Payphone*); *Illinois Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007) (citing *California Payphone* for the proposition that "the FCC considers 'whether the Ordinance materially inhibits or limits the ability of any competition or potential competitor to compete in a fair and balanced legal and regulatory environment'" to show a violation of Section 253(a)) (citations omitted).

[16] *See, e.g.*, Comments of T-Mobile USA, Inc. at 26-29, 37-41, WT Docket No. 17-79, WC Docket No. 17-84 (filed June 15, 2017) (listing examples of unreasonable fees, moratoria, onerous application processes, and burdensome conditions that prohibit or have the effect of prohibiting service); Comments of Sprint Corporation at 36-44, WT Docket No. 17-79, WC Docket No. 17-84 (filed June 15, 2017)(listing substantial barriers to deployment such as restrictions to accessing rights-of-ways, total exclusions to small cell deployment, and excessive delays); Comments of Verizon at 5-8, WT Docket Nos. 17-79, WC Docket No. 17-84 (filed June 15, 2017)(listing examples of local moratoria on small cell applications, substantial delays, excessive fees, and unreasonable conditions that are effectively prohibiting provision of advanced broadband service); Comments of the Wireless Infrastructure Association at 7-15, WT Docket No. 17-79, WC Docket No. 17-84 (filed June 15, 2017)(listing municipal delay, moratoria, unreasonable requirements and conditions, and excessive fees that "effectively thwart the deployment of wireless facilities").

fair and balanced legal and regulatory environment."[17] The Commission likewise should extend this interpretation to the same language in Section 332(c)(7). As described within, the Commission has authority to clarify language in statutes, especially when the statutory language is unclear, and should do so to address the identical language in these two provisions. Courts have positively cited to the Commission's interpretation in *California Payphone* of the language "prohibit or have the effect of prohibiting."[18] This interpretation accomplishes the Commission's goal of accelerating broadband deployment.[19]

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As explained herein, the Commission has the authority to reform state and local requirements that prohibit or have the effect of prohibiting broadband deployment. It should do so quickly to encourage and accelerate broadband deployment for the benefits of consumers across the country.

Respectfully submitted,

/s/ Rebecca Murphy Thompson

Rebecca Murphy Thompson
EVP & General Counsel
Competitive Carriers Association

cc: Will Adams
Rachael Bender
Umair Javed
Erin McGrath

[17] *California Payphone Ass'n Petition for Preemption*, Memorandum Opinion & Order, 12 FCC Rcd 14191, 14206 at ¶ 31 (1997) ("*California Payphone*").

[18] *See, e.g., City of White Plains*, 305 F.3d at 76 (agreeing with Commission's precedent in *California Payphone*); *Level 3 Communications, L.L.C. v. City of St. Louis*, *477 F.3d 5288, 533* (8th Cir. 2007) (citing to *California Payphone* for the proposition that plaintiff must show a "material interference with the ability to compete in a fair and balanced market"); *Illinois Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007) (citing *California Payphone* for the proposition that "the FCC considers 'whether the Ordinance materially inhibits or limits the ability of any competition or potential competitor to compete in a fair and balanced legal and regulatory environment'" to show a violation of Section 253(a)) (citations omitted); *cf County of San Diego*, 543 F.3d at 578 (citing positively to *California Payphone*, 12 FCC Rcd. at 14,209, for its holding that, to be preempted by Section 253(a), a regulation "would have to actually prohibit or effectively prohibit" the provision of services.).

[19] In the alternative, the Commission should clarify that a regulation prohibits or effectively prohibits service contrary to Section 253(a) if it either (i) "materially inhibits or limits" the ability of any competitor to compete, *or* (ii) creates a "substantial barrier" to the provision of any telecommunications service. *See* CCA Comments at 22-23.